No. 4138

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE COPPER COMPANY, a Corporation,
Plaintiff in Error.
vs.
JOE JABER,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

BRIEF OF DEFENDANT IN ERROR

THOMAS P. WALTON,
Attorney for Defendant in Error.

Filed this.....day of....., 1924.

FRANK D. MOUCKTON,
Clerk.

By.....
Deputy Clerk.

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STATEMENT OF THE CASE

In order to clearly present the matter to the Court, a brief statement supplementary to that made by plaintiff in error will be made. Suit was filed, as stated by plaintiff in error, setting up facts, bringing the case within the provisions of Chapter 6, Title 14, Rev. Stat. of Arizona, 1913, Civil Code, being the Employers Liability Law of Arizona. (See quotation of constitutional provision, p. 11, Brief of Plaintiff in error, and Par. 3154, 3155, 3156, 3158, pp. 11-12, Brief of Plaintiff in error.) The amended Complaint (T. R. 10-13) and the Answer of Plaintiff in Error (T. R. 1) make the issues upon which the case was tried.

The case was tried to a jury and a verdict in favor of plaintiff for One Thousand ($1,000.00) Dollars was assessed (T. R. 114). The testimony on

behalf of Jaber was furnished by himself, Mike Kronich (T. R. 100-101), Doctor J. B. McNally (T. R. 95-98), Doctor F. L. Reese (T. R. 52-56), and M. Farrage (T. R. 94). It appears:

> "Jaber was employed by the Copper Company as a mucker during the latter part of June, 1922, including June 27th of that year, the day upon which he alleges he was injured."
> (Brief of Plaintiff in Error, p. 1.)

> "Jaber was working in the mine belonging to the Copper Company in what is known as the 1000-foot level, which is a large tunnel into which standard gauge railway cars are brought and loaded with ore.
>
> It was the duty of Jaber to keep the floor of the tunnel and the tracks clear of ore or muck, which spilled over the sides of the cars when they were being filled, so that the cars would be operated thereon (T. of R., page 42).
>
> The ore is loaded into the cars from what is called a raise or chute which comes out at the top of one side of the tunnel as illustrated in Defendant's 'Exhibit 2' (T. of R., p. 19), and more fully described in the testimony of Mr. DeCamp on pages 61 and 62 of Transcript of Record.
>
> Occasionally it becomes necessary to set off a blast in the chute because large rocks may arch at the point of discharge or the ore may be moist and so clog up the chute."
> (Brief of Plaintiff in Error, p. 3.)

Before the injury or blast, Jaber had never been sick (T. R. 42). Before the blast he was feeling

fine, had no headache, no dizziness, no roaring in ear (T. R. 48). Blast *went off, had headache, dizzy, ear drill, fell down, was awfully sick....* Blast was in chute in raise.

Jaber was in tunnel thirty-five or forty feet from raise (T. R. 43). He got to his room at 1 o'clock at night after blast, couldn't sleep, headache, was sick, ear drill, was dizzy. At 9 o'clock next morning saw Doctor Walsh at Copper Company hospital, told Doctor Walsh all about it (T. R. 44). Mr. Farrage was with Jaber first time he went to hospital (T. R. 57). Jaber told Doctor Walsh he felt trouble with ear when blast went off (T. R. 44). Told Doctor Walsh trouble with ear came from shot or blast. Saw Doctor Tom at Copper Company's hospital, told him about ear trouble (T. R. 45). *From the time of the blast, Jaber says he has not been able to hear in left ear* (T. R. 47). Jaber says when he went to work for Copper Company, Doctor Walsh undressed him and examined him in every way, said nothing about any disease (T. R. 58). Mr. Farrage testified that he accompanied Jaber to Copper Company hospital 27th or 28th of June, 1922; that Jaber told doctor at hospital that he was *dizzy from blast in mine,* was *hurt from a shot* (T. R. 94-95).

Doctor Reese of Phoenix, Arizona, an eye, nose and ear specialist (qualifications admitted by defendant), testified that he examined Jaber September 20, 1922. Examined left ear thoughly (T. R. 52). Came to conclusion *Jaber could not hear in left ear.* In his opinion there is no treatment that will relieve *nerve deafnes* (T. R. 54). The deafness in Jaber's ear is *nerve deafness....* It is my opinion

that the condition of Jaber's ear is due to *concussion*, or possibly a condition that comes under the name of *shell shock* (T. R. 54). There may be trouble with inner ear and ear drum appear perfectly normal, such trouble usually results from *shell shock or explosion.* A hemorrhage in inner ear leads to a form of *nerve deafness.* This would not show on ear drum. *Hemorrhage could be caused by a blast* (T. R. 52). At time of examination found nothing wrong with tonsils, noticed no pus about teeth, did not observe any effect of nephritis, found no evidence of a toxic condition. A toxic condition which would have destroyed hearing would likely *affect both ears* (T. R. 55-56).

Doctor J. B. McNally of Prescott, Arizona, a witness for Jaber (qualifications in every respect admitted by plaintiff in error), said that loose teeth from pus will never tighten. He examined Jaber two or three days before testifying at trial, *found blood pressure normal* (T. R. 95). Noise in ear and dizziness is sometimes found in nephritis of *old standing*, Bright's disease in *aged people*, where *hardening* of the *arteries* has set up and *high blood pressure* (T. R. 95-96). Not likely a man would have advanced case of Bright's Disease and still have *normal blood pressure.* In chronic Bright's disease, noise in ear is usually in both ears and is irregular *noise.* In case of accident to ear, it is an ordinary constant *buzz* and *does not change.* The latter not likely *found in Bright's disease* (T. R. 96). Doctor McNally examined Jaber's urine and found no true casts (T. R. 95-96).

It is not thought necessary to go more into details, as the statement of plaintiff in error and the

foregoing statement appears amply sufficient for all purposes of considering the assignment of errors urged for reversal. Moreover, we do not think it necessary to consider any statement of facts in order to dispose of this case, because *no assignment* of error made by plaintiff in error is *sufficient* under the law and the rules of this Court (T. R. 116-119).

PART I.

No assignment of error urged by plaintiff in error for reversal is sufficiently stated, nor is any assignment of error contained in the whole list of assignments of error sufficiently stated.

(A)

Only two assignments are relied upon for reversal by pliantiff in error, therefore our attention will only be directed to those assignments urged. We shall therefore, take up the assignments relied upon in their order and dispose of each. Counsel say:

> "*Errors relied on for reversal.*
>
> There are only two questions involved in this case. The first and principal one is,
>
> The refusal of the trial court to give the instruction requested by the Plaintiff in Error based upon its theory of defense, which was amply supported by evidence produced by Plaintiff in Error, that the Defendant in Error was suffering from a disease and not from an injury, said disease being the cause of the pain, roaring and buzzing in his ear. The requested instruction being set forth in full on pages 113 and 114 of the Transcript of Record and in the Assignments of Error set forth below."
>
> (pp. 5-6, Brief of Plaintiff in Error.)

The first ground and "*principal one*" we shall first examine. It appears to be Assignment No. 2; the refusal of the Court to give a certain instruction (T. R. 117-118, Brief of Plaintiff in Error, pp. 6-7). Defendant in error contends that Assignment No. 2 is *insufficient under rule No.* 11, because this assignment neither *quotes* nor *refers to any evidence whatever that shows the relevancy* of the *instruction* requested, *neither does* it state *any reason* whatever why the Court should have given this instruction. It simply states that the Court erred in refusing to give a certain instruction and quotes the instruction.

> *Assignments of error to instructions asked for and refused will be disregarded when they neither quote nor refer to the evidence that shows the relevancy of the proposition sought to be charged.*
>
> Newman v. Virginia, T. & C. Steel & L. Co., 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 228; Union Casualty & S. Co. v. Schwerin, 26 C. C. A. 45, 42 U. S. App. 514, 80 Fed. 638; Chicago M. & P. Co. v. Bennett, 104 C. C. A. 309, 181 Fed. 799, 800; Chapman v. Reynolds, 23 C. C. A. 166, 33 U. S. App. 686, 77 Fed. 274; Western North Carolina Land Co. v. Scaife, 25 C. C. A. 461, 42 U. S. App. 439, 80 Fed. 352.

The Court says in Newman v. Virginia, supra, p. 234, 80 Fed.:

> "So far as the assignments relate to instructions asked for and refused they neither quote nor refer to the evidence that shows the rele-

vancy of the proposition of law propounded by such instruction."

Again the Court says in Union Casualty & Surety Co. v. Schwerin, 80 Fed. 639, supra:

> "We are unable to consider the points suggested by counsel for the plaintiff in error concerning the refusal of the Court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full, nor its substance referred to in the assignments of error."

(B)

"*The second error relied on for reversal.* That the verdict of the jury is not supported by and is contrary to the evidence."

This ground for reversal appears to be based upon Assignment No. 4 (T. R. 118). We shall deal with this assignment as briefly as possible, as it is so *patently insufficient that* it needs only to be called to the attention of the Court.

The law upon this proposition has been very plainly stated and it seems that counsel have wholly overlooked the necessary procedure to bring such matter to the attention of the Court:

> *An assignment that the verdict is not justified by the evidence and is contrary to law will not be considered, as it does not conform to the rule.*

Chicago, M. & St. P. R. Co. v. Anderson, 94 C. C. A. 241, 168 Fed. 902; Ireton v. Pennsylvania Co. 107 C. C. A. 304, 185 Fed. 84; Western U. Teleg. Co. v. Winland, 104 C. C. A. 439, 182 Fed. 493.

Manifestly, neither assignment of error is sufficiently stated to justify the Court in considering them, since:

The alleged error of law assigned must be sufficiently specific, so that the understanding and attention of the court is at once arrested without being forced to search the record to determine what the issue is.

Grape Creek Coal Co. v. Farmers' Loan & T. Co., 12 C. C. A. 350, 24 U. S. App. 38, 63 Fed. 891; Piper v. Cashell, 58 C. C. A. 396, 122 Fed. 616; Esterly v. Rua, 58 C. C. A. 548, 122 Fed. 609.

The Court will not search the record for errors.

Green County v. Thomas, 211 U. S. 602, 53 L. ed. 345, 29 Sup. Ct. Rep. 168.

The judgment of the trial Court must therefore be affirmed.

PART II.

Should the Court deem either of the reasons for reversal sufficiently stated in the assignments of error, or should the Court determine to consider the

assignments of error urged by counsel, regardless of the deficiency in their statement, then it is submitted that neither assignment raises a question that can be under any consideration reversable error. The questions raised are wholly without merit. The points and authorities we think beside the issues, hence do not furnish the Court light or authority germain to the investigation.

There are only two assignments of error relied upon by plaintiff in error, to-wit:

(a) The Court erred in refusing to give a certain instruction (Assig. No. 2, T. R. 117-118).

(b) The verdict of the jury is not supported by and is contrary to the evidence (Assig. No. 4, T. R. 118).

We shall consider the assignment stated (a) first above. Obviously, the *only* question presented by this assignment is whether the Court erred in refusing to give *this instruction*. This assignment surely does not present to the Court for consideration the broad question of the *duty of the trial Court to submit to the jury and give instructions thereon any theory or defense which the evidence tends to support*. *If* counsel had wanted to present this question on appeal, needless to say, it should have been squarely presented to the trial Court, and upon refusal, saved exception and presented an assignment based upon such exception and refusal by the Court to give opinion upon this matter. Manifestly, this broad question cannot be raised for the first time on appeal or writ of error. We shall discuss this question by laying down a proposition.

PROPOSITION I.

The Court did not err in refusing to give the instruction requested, because the instruction as requested was not a correct statement of the law.

POINTS AND AUTHORITIES.

(1) The instruction requested was not a correct statement of the law if the word "*injury*" was used in more than one sense in the instruction. Neff v. Cameron, 213 Mo. 350, 111 S. W. 1139, 127 A. S. R. 606, 18 L. R. A. (N. S.) 320.

(2) The instruction requested was not a correct statement of the law unless it ought to have been given in the very terms in which it was proposed. Brooks v. Marbury, 11 Wheat 78, 6 L. ed. 423, 14 R. C. L. pp. 800-801, Par. 60, and cases cited.

(3) The instruction requested was not a correct statement of the law if it was erroneous in part. 14 R. C. L. p. 800, Par. 60.

(4) The instruction requested was not a correct statement if it was conflicting or contradictory in itself. 14 R. C. L. pp. 777, Par. 45, and cases cited.

(5.) The instruction requested was not a correct statement of the law if it was indefinite, uncertain, involved or ambiguous. 14 R. C. L. pp. 770-771, Par. 38.

(6) The instruction requested was not a correct statement of the law if it *assumed facts in issue.* 14 R. C. L. p. 38, Par. 12, and cases cited.

ARGUMENT.

The instruction requested was properly refused if the word "*injury*" is used in more than one sense. It is first used to designate the result of an accident, for instance:

> "The Court instructs the jury that under the Employers' Liability Law the employer is liable to the employee only when the *injury* is caused by an accident arising out of and in the course of the labor, service and employment of the employee and due to a condition or conditions of such occupation or employment and only when such *injury* shall not have been causd by the negligence of the employee injured."

The word "*injury*" is next used to designate an assumed condition which is not the result of an accident, but the result of assumed sickness or disease:

> "and if you believe from the evidence in this case that the alleged concussion did not cause plaintiff's *injury*, then he cannot recover even though you do find that he is suffering and has suffered from some disease."

Parts of the instruction requested are contradictory, uncertain, involved and ambiguous, for instance:

> "Such law does not *cover* ordinary sickness, even though such sickness was contracted during the course of the employment; unless you can say that the accident caused the sickness."

Certainly, this is not a clear statement, but is ambiguous and indefinite. If instead of the word "*cover*", counsel had used the expression "*contemplate the recovery of damages for*" or some such plain expression, that part of the instruction might have been rendered intelligible and reasonably definite. However, the part of the instruction above quoted, even though obviously crude, ambiguous and uncertain, is set *at naught* by the following broad statement:

> "The law does not cover or contemplate payment for any disease."

If counsel intended for the Court to say here that the law does not contemplate recovery of damages for an accident which causes a disease or even aggravates an existing disease, such statement is far from a correct statement of the law. 8 R. C. L. pp. 436-438, Pars. 10-11, Verde Combination Cop. Co. v. Reito, 22 Ariz. 445, 198, Pac. 462.

The instruction requested was properly refused because facts in issue are assumed, for instance:

> "You cannot and must not permit your sympathy for a man who has been sick or diseased to give him damages or compensation, because under the law he is not entitled to it and all humanity must suffer the effects of certain diseases."

Counsel would here have the Court tell the jury that defendant in error, Jaber, "has been sick or diseased," and the jury must not permit their sympathy for a "sick or diseased" plaintiff to induce them to give him damages or compensation. They

want the Court to lay down the proposition as a fact that Jaber was "sick and diseased" and follow it by telling the jury that under the law he is not entitled to damages "because all humanity must suffer the effect of certain diseases." Regardless of what counsel for plaintiff in error may contend that the evidence adduced by witnesses on behalf of the Copper Company shows or tends to show, Jaber testified that before the injury he had never been sick (T. R. 42). Before the blast he was feeling fine (T. R. 48). Blast went off, he had headache, dizzy, ear drill, fell down, was awfully sick (T. R. 43). *From the time of the blast, Jaber says he has not been able to hear in left ear* (T. R. 47). Certainly, this testimony raises the sharpest kind of an issue as to whether or not Jaber was *ever sick, prior to the injury.* Obviously, on this state of the evidence, the Court was not justified in giving the instruction, because it assumed facts which were in issue; moreover, it would have been *plain error* to give such an instruction, even though the instruction as presented were not subject to the other fatal criticisms noted above.

We have already discussed the matter laid down by Proposition II. (Brief of Plaintiff in Error, p. 13):

> "It is the duty of the trial Court to submit to the jury, and give instructions thereon any theory or defense which the evidence tends to support."

This proposition, as we have already pointed out, is not raised by either assignment of error urged by plaintiff in error, as the record does not show from

a perusal thereof where counsel presented such a proposition to the trial Court or took any exception upon the refusal of the Court to so charge. *Neither* does the assignment of error—*the refusal of the Court to give the instruction requested—raise this question.* Counsel cite the case of Douglas and Mandeville v. McAllister, 3 Cranch 298, 2 L. ed. 445, in support of their proposition. Upon examination of this authority it is found that the case is not in point, it simply lays down the time-worn elementary principle that the Court must instruct on any point relevant when a *proper* instruction is requested. It will be noted that the instruction requested in that case was held by the Court not to be a correct statement of the law and was refused, and the Court held such refusal was not error. Then counsel cite the case of Smith v. Carrington, 4 Cranch, 62, 2 L. ed. 550. This case in no way can comfort plaintiff in error, because the Court simply lays down the elementary proposition that a party by a request for a *proper* instruction may require the opinion of the Court and, upon refusal, have good cause for exception. This proposition, of course, is not disputed. It is just as good law now as it was when it was laid down in that case. Of course, there is an exception that should be remembered in this connection, which exception is just as firmly founded on principle as precedent, and is this:

> "When the general charge substantially covers the case, and was all that was necessary to give the jury an intelligent understanding of the law applicable to the facts, the Court may refuse special charges offered, even though

such special charges may state the law clearly as applied to the facts.

> Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 29 L. ed. 712, 6 Sup. Ct. Rep. 481; Norfolk & P. Traction Co. v. Rephan, 110 C .C. A. 254, 188 Fed. 284, 285; International Banking Corp. v. Payne, 110 C. C. A. 418, 188 Fed. 40; Southern R. Co. v. Terrell, 108 C. C. A. 377, 186 Fed. 299; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 295, 23 L. ed. 899; Ruch v. Rock Island, 97 U. S. 695, 24 L. ed. 1102; Northwestern Mut. L. Ins. Co. v. Muskegon Nat. Bank, 122 U. S. 510, 30 L. ed. 1103, 7 Sup. Ct. Rep. 1221; Meyer v. Richards, 49 C. C. A. 344, 11 Fed. 297; Simmons Co. v. Eskridge, 186 Fed. 676; Coulter v. B. Thompson Lumber Co., 74 C. C. A. 38, 142 Fed. 706; Mountain Copper Co. v. Van Buren, 66 C. C. A. 151, 133 Fed. 7.

Counsel then cite sections 514-516, Rev. Stat. of Arizona, 1913, Civil Code, and Southwest Cotton Co. v. Ryan, 22 Ariz. 520. In this connection we call attention to the fact that the Federal Courts are not bound by state laws or practice in charging the jury. Charging the jury is a function of the personal administration of the judge, and does not fall within the provisions of the conformity act sec. 914, U. S. Rev. Stat. U. S. Compt. Stat. 1901, p. 684, for it is neither practice, proceeding, nor pleading.

> Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286; Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co., 66 C. C. A. 543, 133 Fed. 713, 714; Knight v. Illinois C. R. Co., 103 C. C. A. 514, 180 Fed. 372.

Again, the Federal Courts are not required to instruct the jury upon the "whole law." Steers et al. v. United States, 192 Fed. 1, the Court says (p. 10, supra):

> "Counsel urge in this court that under the Kentucky practice it is the duty of the trial judge to give to the jury 'the whole law,' and that respondents, in a criminal case, carries no such burden, as we, by these conclusions, put upon them.' This is a matter pertaining to the conduct of the trial itself by the trial judge and it is not covered by the conformity act."

Counsel then cite and quote from the case of Stoll v. Loving, 120 Fed. 805, 57 C. C. A. 173. There is nothing new in this case, as the instruction requested in the Stoll case was held to be a proper instruction.

Counsel then cite the case of Burgess Sulphite Fibre Company et al. v. Drew, 157 Fed. 212, 84 C. C. A. 660. From an examination of this case, we find the Court expresses itself in these words at p. 215, Fed. *supra.*

> "The defendants were entitled to have the various propositions as to the laws of Vermont, to which we have referred, clearly and fully sifted out and explained to the jury; that the defendants ultimately requested such explanations; that they failed to obtain them; that they duly excepted."

Certainly, this expression is not different than we have already stated, that is, *a proper instruction must be requested, refused and excepted to, and*

upon writ of error, a proper assignment made up in order to review the ruling of the trial court.

Counsel then cite the case of Morenci Southern Ry. Co. v. Monsour, 21 Arizona, 148, 185 Pac. 938, and quote from page 942, a statement made by the Supreme Court of Arizona. Note the last expression in this statement quoted:

> "The tendered instruction was a correct statement of the law, and should have been given."

Certainly, this decision is not different from the authorities already cited by defendant in error to the effect:

(1) That an assignment of error consisting of the refusal of the Court to give a particular instruction is not good unless the instruction itself is a "*correct statement of the law.*"

(2) That an assignment of error consisting of the refusal of the Court to give a particular instruction does not call upon this Court to decide whether "it is the duty of the trial Court to submit to the jury, and give instructions thereon, any issue, theory or defense, which the evidence tends to support," unless, of course, the requested instruction ought to have been given in the very terms in which it is proposed.

> Brooks v. Marbury, 11 Wheat. 78, 6 L. ed. 423; Fowler v. Brantley, 14 Pet. 318, 10 United States, L. ed. 473, 14 R. C. L., pp. 800-801, Par. 60, and cases cited.

We think we have thoroughly disposed of the idea that the trial Court erred in refusing to give the in-

struction requested by plaintiff in error, and have shown conclusively that no reversible error has been committed by the trial Court in this respect; moreover, the *general charge of the trial Court* (T. R. 103-112) *substantially covered the case* and *was all that was necessary to give the jury an intelligent understanding of the law applicable to the facts.*

> Iron Silver Mining Co. v. Cheesman, 116 U. S. 529, 29 L. ed. 712, and other cases cited to this effect, *supra.*

PART III.

The second assignment of error relied upon by plaintiff in error for reversal (Brief of Plaintiff in Error, p. 7) is "the verdict of the jury is not supported by and is contrary to the evidence." We think it is hardly worth while to notice at all this assignment, for reasons already pointed out to the Court because of its *patent insufficiency*, as shown in this brief, Part IB, *supra.* However, we shall briefly examine this assignment and the argument in the brief of plaintiff in error on this question. The point made by plaintiff in error (their brief, p. 9):

> "III. The verdict is wholly unsupported by the evidence and against the uncontradicted evidence and every legitimate inference deducible therefrom."

we submit is wholly untenable. This point is attempted to be supported by the citation of thirteen different authorities. These authorities have been

partially examined and we find that the sum and substance of the holdings in these cases is to this effect: All that is necessary in order for an appellate court to affirm a judgment of a trial Court where a verdict in favor of plaintiff has been returned is that the record must contain some positive, affirmative evidence in support of each material allegation in the complaint.

In order to determine whether or not there was sufficient evidence to support the verdict, of course, it would be necessary to examine all of the testimony furnished at the trial by the defendant in error. If there is some affirmative evidence on each and every material allegation in the complaint, then certainly we need go no further. We shall not burden the Court with again reciting the evidence adduced by defendant in error at the trial, as we think our statement of the case in this brief amply covers the case and demonstrates that there was an abundance of positive affirmative evidence adduced by defendant in error at the trial upon each and every material allegation in the complaint, based upon the Arizona Employers' Liability Law, being Chapter 6, Title 14, Rev. Stat. of Arizona, 1913, Civil Code. (For text part of act, see Brief of Plaintiff in Error, pp. 11-12.)

Counsel seem to lose sight of the fact that in this Court only *questions of law* are considered and not *law* and *fact*.

> Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co., 52 C. C. A. 95, 114 Fed. 134; Wichita R. & Light Co. v. Dulaney, 86 C. C. A. 397, 159

Fed. 417; Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

Again:

The rule is that when the facts are tried by a jury under sections 649, 700 of *U. S. Rev. Stat., U. S. Comp. Stat.* 1901, *pp.* 525-570, and a *general verdict returned, it is conclusive in the appellate court; it can only be remedied by a motion for new trial.*

Lehnen v. Dickson, 146 U. S. 73, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; Union County Nat. Bank v. Ozan Lumber Co., 103 C. C. A. 584, 179 Fed. 710; Hayden v. Ogden Sav. Bank, 85 C. C. A. 558, 158 Fed. 91; New York v. Washburn, 64 C. C. A. 132, 129 Fed. 564; Mason v. Smith, 112 C. C. A. 146, 191 Fed. 502; West Virginia N. R. Co. v. United States, 67 C. C. A. 220, 134 Fed. 198; J. W. Bishop Co. v. Shelhorse, 72 C. C. A. 337, 141 Fed. 643, and cases cited."

The appellate court, as a rule, cannot weigh evidence on writ of error.

Jackson v. Mutual L. Ins. Co., 108 C. C. A. 389, 186 Fed. 447; Toledo, St. L. & W. R .Co. v. Howe, 112 C. C. A. 262, 191 Fed. 776.

The appellate court must take facts as found.

Hamilton v. Loeb, 108 C. C. A. 108, 186 Fed. 7; Ware v. Wunder Brewing Co., 87 C. C. A. 235, 160 Fed. 79, and cases cited."

Of course, it is immaterial in disposing of this assignment of error and the question attempted to

be raised thereby *what the witnesses for plaintiff in error testified to at the trial,* as this Court cannot weigh the evidence nor pass upon the credibility of the witnesses.

We submit that no reversible error has been pointed out by plaintiff in error, nor has any reason been urged why the judgment of the trial Court should be reversed. All of the allegations of the complaint were abundantly supported by evidence at the trial on behalf of defendant in error. The jury returned its verdict. Plaintiff in error in the trial court filed motion for new trial. New trial was denied. The judgment should be affirmed.

CONCLUSION.

Defendant in error is compelled, though reluctantly, to suggest to this Court that 10 per cent damages should be assessed against plaintiff in error, in addition to the 6 per cent interest provided for in the judgment of the trial Court. That this is a case which comes within Rule 30 of this Court, because it manifestly appears:

(1) The writ of error in this case has delayed the proceedings on the judgment of the trial Court and appears to have been sued out *merely for delay.*

(2) The judgment of the trial Court has been stayed and defendant in error has been denied the fruits of his judgment.

(3) A total of seven assignments of error were

presented in the petition for writ of error, and only two assignments are relied upon in this Court.

(4) The five assignments abandoned by plaintiff in error are concededly without merit in form or substance.

(5) Of the two assignments of error relied upon by plaintiff in error, neither one is sufficiently stated.

(6) If either of the two assignments of error relied upon is sufficiently stated to raise a question at all, it is wholly without merit upon this record.

It would seem difficult to imagine a case taken by writ of error to an appellate court in which there was greater lack of merit. This Court should not be burdened with determining cases upon the character of showing made by plaintiff in error on this record.

Respectfully submitted,

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Attorney for Defendant in Error.